

Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of S.E.,)
Carmel Clay Schools)
And the Hamilton-Boone-Madison)
Special Services Cooperative) **Article 7 Hearing No. 1348.03**
)
Appeal from the Decision of)
Dennis D. Graft, Esq.)
Independent Hearing Officer)

Procedural History and Background

The Student¹ requested a due process hearing on April 29, 2003, to resolve fourteen (14) issues with the School. On April 30, 2003, Dennis D. Graft, Esq., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

On May 14, 2003, the IHO issued a pre-hearing order indicating that by agreement of the parties the pre-hearing conference was continued until May 22, 2003, and that pending the pre-hearing conference, the Student would receive 2 hours of homebound instruction per day at the public library.

A pre-hearing conference was held on May 22, 2003. The pre-hearing order determined the issues to be those set forth in the Student's request for hearing dated April 29, 2003:

1. The public agency failed to assess the Student's educational needs based on his disability.
2. The public agency failed to develop and implement an appropriate individualized educational program (IEP).
3. The public agency failed to conduct a proper functional behavioral assessment (FBA).
4. The public agency failed to develop and implement a proper behavioral intervention plan (BIP).
5. The public agency failed to offer and provide the appropriate related services.
6. The public agency failed to offer and provide the appropriate supplementary services.
7. The public agency failed to provide the appropriate training to those working with the Student.

¹Student refers to both the Student and Parents as parties herein.

8. The public agency failed to develop appropriate measurable goals with appropriate benchmarks.
9. The public agency failed to maintain appropriate data.
10. The public agency failed to provide the family accurate information regarding their son's progress or lack thereof.
11. The public agency failed to develop and implement a proper "transition" plan from Silvercrest to Carmel High School.
12. While the Student was placed at Silvercrest, the case conference committees did not include a representative of the public school corporation of the Student's legal settlement.
13. The public agency failed to provide proper prior written notice of a proposed change of placement. The Parents did not receive prior written notice that the public agency had determined that a residential facility would not be considered and the public agency would explore St. Vincent's Stress Center, day program. In addition, the Parents were not provided a description of each evaluation procedure, test, record, or report the agency used as a basis for this refusal of a placement option. The public agency did not invite St. Vincent to the case conference and refused to contact the Parent's suggested placement option because it was a residential facility.
14. The Student is not receiving a free appropriate public education (FAPE) in the least restrictive environment (LRE). The Student's disability is being allowed to interfere with his educational progress.

The order further indicated the parties would conduct discovery to clarify the specific issues and to notify the IHO of the specific issues by June 30, 2003. Hearing dates were established, with the IHO's decision to be rendered by July 26, 2003. The Student would continue to receive 2 hours per day of homebound instruction.

An additional pre-hearing conference was held on June 2, 2003. In the pre-hearing order the IHO granted the School's oral motions for extension of time for the hearing and decision such that the written decision is due by July 26, 2003. The School was directed to provide to the Student a complete copy of the Student's records. Any fees charged could not exceed the actual cost of duplication. The Student was to continue to receive 2 hours per day of homebound instruction.

On June 30, 2003, the School filed its Verified Motion to Compel or in the Alternative, Motion to Dismiss. The IHO conducted a telephone conference on July 2, 2003, to address the motion. The IHO granted the School's Motion to Compel and ordered the Student to answer with specificity the School's interrogatories and requests for production of documents. The order further indicated that if the Student failed to appropriately answer the interrogatories and produce the documents requested, the IHO may:

1. Dismiss this matter.
2. Not allow the Parent to introduce matters into evidence.
3. Continue the due process hearing until this order is obeyed.
4. Find the Parents in contempt.
5. Require the Parents to pay the School's attorney fees.

Upon motion of the School, the hearing dates were continued with the IHO's decision due August 27, 2003.

The School filed a Verified Motion to Dismiss on July 28, 2003. On the same date, the IHO issued an Order dismissing all claims with the exception of the residential placement issue. On July 29, 2003, the Student filed a Verified Motion to Reconsider, a Verified Notice to Tribunal, and a Motion to Change Order of Production.

On August 5, 2003, the date of the scheduled hearing, the parties met and mediated this matter and requested the hearing be continued. The IHO granted the request and continued the hearing such that the decision would be due by October 15, 2003.

On September 15, 2003, the Student filed a Verified Motion for Order Affirming Agreement. The IHO conducted a pre-hearing/status conference and issued an order on September 17, 2003. The School was granted until October 1, 2003, to respond to the motion, with the Student's response due by October 8, 2003. Each party subsequently requested, and was granted, additional time to respond. The School filed its Verified Reply on October 7, 2003, and the Student's Verified Reply was filed on October 22, 2003.

The IHO issued his written decision on October 24, 2003. The IHO determined thirteen (13) findings of fact.

1. That on June 30, 2003 the Petitioner² was ordered to answer by July 22, 2003, with specificity, the Respondents' Interrogatories and Request For Production of Documents previously propounded to Petitioner.
2. The Petitioner and his counsel were further advised that if the Petitioner failed to appropriately answer the Interrogatories and produce the documents requested, this matter may be dismissed, not allow Petitioner to introduce matters into evidence, continue the due process hearing, be found in contempt, and/or require payment of attorney fees.
3. The Petitioner did not answer or produce documents as ordered by July 22, 2003, nor by July 25, 2003, the extension agreed to by Respondents' counsel.
4. That on July 28, 2003 Respondents filed their Verified Motion To Dismiss due to Petitioner's failure to timely answer the interrogatories or produce the requested documents.
5. On July 28, 2003, due to Petitioner's failure to comply with the prior discovery order, this Hearing

²"Petitioner" in the IHO's decision refers to the Parents or Student, while "Respondent" refers to the School Corporation or Cooperative.

Officer dismissed all of Petitioner's claims except for the residential placement claim.

6. On July 29, 2003, a pre-hearing conference was held. The parties agreed to present as evidence solely the testimony of representatives of the proposed day treatment center/residential placement, with this Hearing Officer to decide between placement at the day treatment center or the residential program at the same site. The petitioner's counsel inquired about payment of a portion of his fees, proposing \$2,000.00 to \$3,000.00 if the matter was settled or the period of the hearing was greatly shortened. Counsel for Respondent's advised that he would propose this to his clients, especially if the hearing was not held or substantially shortened with reduction of Respondent's counsel's fees, but he could not make any assurances.
7. On June 27, 2003 counsel for Respondents, by letter, had offered a long term day school program at a local private facility with the establishment by a case conference committee of clearly articulated outcomes (goals and objectives) that would define success in that program. This placement would be for the first 90 days of the 2003-2004 school year. At the conclusion of this time period the case conference committee would then reconvene to determine whether the outcomes were met. If they were not, then the next LRE placement would be a residential placement.
8. The Petitioners were proposing a private residential placement outside of the State of Indiana as the required LRE for the student.
9. Shortly after July 29, 2003, apparently, the Respondents contacted the Indiana Department of Education about state funded placement and a mediator was appointed, rather than having this Hearing Officer hear testimony from the representatives of the private facility, which had both a day program and residential program, and were familiar with the student. This Hearing Officer never viewed his role to one of mediator but to determine, based solely on the testimony of these witnesses, which placement option would be a free appropriate education for the student in the least restrictive environment.
10. On August 4, 2003, the first day of the scheduled due process hearing, the due process hearing commenced but then recessed to allow the parties to meet with the mediator.
11. The parties mediated the matter and a mediation agreement was reached. The agreement provided that the parties would convene a case conference for the purpose of allowing the Respondents to apply to IDOE for funding for a residential placement at the private facility in the State of Indiana. The parties further agreed to continue the due process hearing pending resolution of the residential funding application to IDOE.
12. Based upon the representations of counsel and the respective pleadings herein, apparently a case conference was held on August 5, 2003, a residential placement in a facility in Indiana was agreed upon and an application to the IDOE for funding for this residential placement was to be completed

and submitted to IDOE. The application was submitted to IDOE.

13. IDOE subsequently approved funding for this residential placement and the student is currently placed in the private residential facility in the State of Indiana.

Based upon these findings of fact, this Hearing Officer made the following conclusions.

1. All issues and claims of the Petitioner, but for the placement at a day treatment or at a residential placement, were heretofore dismissed due to Petitioner's failure to comply with the prior orders herein.
2. That the Respondents' proposal for placement prior to the start of the due process hearing and mediation was a day program at an in state private facility.
3. The Petitioner's proposal for placement prior to the start of the due process hearing and mediation was a private residential facility located outside the State of Indiana.
4. It appears, therefore, that both parties changed their respective positions through mediation, with the parties agreeing to a residential placement in a private facility in the State of Indiana.
5. The Respondents' counsel never guaranteed nor agreed to pay any attorney fees to Petitioner's counsel, only proposing he would discuss this with his clients if this matter was settled without a due process hearing or if the due process hearing was concluded in a more expedited fashion. The costs to the Respondents in defending this matter would then have been reduced, in addition to other related costs, such as this Hearing Officer's charges, transcription costs and other expenses.
6. This Hearing Officer lacks the authority to determine who is the prevailing party or the Petitioner's entitlement to attorney fees. Article 7, specifically 511 IAC 7-30-6(a), vests exclusive jurisdiction to the civil courts (federal or state) to determine who is the prevailing party and any entitlement to attorney fees. Further, IDEA provides a specific and separate cause of action for attorney fees.

Based on the foregoing, the IHO issued the following Orders:

IT IS THEREFORE ORDERED that all matters herein were either dismissed or settled by the parties. There remain no present justiciable issues.

IT IS FURTHER ORDERED that this Hearing Officer lacks the authority to determine who is the prevailing party herein and, therefore, makes no such determination.

IT IS FURTHER ORDERED that this Hearing Officer lacks the authority to determine and award attorney fees to Petitioner.

Petitioner may seek such attorney fees in federal or state court, which court shall then determine who was the prevailing party and, if the Petitioner was the prevailing party, any attorney fee award.

Subsequently, the Student filed a Verified Motion to Reconsider which was denied by the IHO on November 17, 2003.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Student's Petition for Review

The Student filed a Petition for Review of the IHO's decisions of October 24, 2003, and November 17, 2003. At the same time, the Student filed a Motion for Extension of Time to amend his petition for review. The Student's counsel subsequently advised counsel for the Board of Special Education Appeals (BSEA) that he would not be filing an amended petition.

The Student objects to the IHO's first order that all matters were either dismissed or settled by the parties. The Student argues that although the IHO entered an order dismissing these claims, the next day the parties met and began to clarify and limit the issues. The Student argues the issues were not dismissed. Further, because of the agreement to attempt to resolve the case without additional litigation, not all of the issues were addressed at that time.

The Student objects to Finding of Fact No. 8 and Order No. 3,³ in which the IHO found that the Student's proposal for placement was a private residential placement located outside the State of Indiana, and the third order. The Student argued that it was the School that changed its position but that the Student did not change his position.

The Student believed there was an agreement, including the reimbursement of attorneys' fees, and that the placement would be appropriate. As a result, no due process hearing was held. As required by the mediation agreement, a case conference committee was convened and the School recommended placement in a private residential facility. An application for extraordinary funding was prepared and submitted to the Indiana Department of Education. The application was approved and the Student was placed in the residential facility. The Student believed the agreement was based on the School recommending a private residential placement and the School reimbursing Student's attorneys' fees. Without both of these, the Student wanted a hearing.

The Student has many unresolved issues, including several procedural violations. The Student is also having difficulty in his current placement. The Student was told the School would be scheduling a case

³Although the Student indicated an objection to Order No. 3, it appears the objection is to Conclusion of Law No. 3 which is related to Finding of Fact No. 8.

conference committee meeting.

With the unresolved issues, the current issues regarding placement, and the School's refusal to reimburse attorneys' fees, the Student requests the case not be dismissed and a due process hearing held.

The Student requests the BSEA reverse the IHO, remand this case and allow the Student to amend his request for a due process hearing to include current placement issues, and remand for a due process hearing on all unresolved issues, allow oral argument, and for any other just and appropriate relief.

School's Response to Petition for Review

The School argues that the Student has taken a shotgun approach that confuses the matter and is apparently designed to obscure the intent of this appeal, which is to obtain attorneys' fees. The School has attempted to identify the Students issues as follows:

1. The IHO erred in dismissing all claims with the exception of the residential placement claims due to the Petitioners' failure to cooperate in discovery.
2. The IHO erred in dismissing the due process hearing as moot after the mediation resolved the residential placement claims since there were "unresolved issues;" and
3. The IHO erred in failing to award attorneys' fees or in the alternative to enter an Order incorporating the Mediation Agreement into a final order thus making them prevailing parties under the IDEA and Article 7.

To address these issues the School argues the IHO did not err in dismissing all claims with the exception of the dispute over a residential placement due to the Student's complete failure to cooperate in discovery. The Student failed to give adequate responses to the School's discovery request and the IHO issued an order compelling discovery, noting that failure to comply could result in dismissal of the claims. The Student failed to comply by the date given in the IHO's order, but Student's counsel contacted the School's counsel seeking additional time to respond. The School agreed, but the Student still failed to respond. The School then sought, and received, an order dismissing the claims.

The IHO did not err in dismissing the action as moot following the completed mediation of the residential placement claims. Following the dismissal of the claims other than those surrounding the issue of residential placement, the parties successfully mediated the sole remaining issue. As a consequence, there were no issues left for the due process hearing. The only remaining issue appears to be the Student's demand for attorneys' fees, something that Article 7 specifically bars hearing officers or mediators from addressing. The IHO did not err.

As an additional basis for overturning the IHO's decision and reopening the hearing, the Student contends there are current issues regarding placement and the involvement of Mr. Marra. The appropriate procedure to address new concerns arising out of the current placement is to do just as Mr. Marra suggested, and that is to convene a case conference to discuss the issues. This case should be

over and any new issues addressed through the various mechanisms set forth in the Individuals with Disabilities Education Act (IDEA) and Article 7.

The School also notes that mediation is separate and distinct from the hearing process under both IDEA and Article 7. Although the Student sought to have the IHO affirm the settlement agreement, the School argues the Student fails to understand the distinction between a settlement agreement and a mediation agreement. The distinction is reinforced by the fact that state assisted mediation is confidential under both IDEA and Article 7 such that the IHO could not examine the basis for the agreement as the Student seeks. Finally, the School points out that prior to re-authorization, Article 7 did contain a process whereby IHOs would approve mediation agreements. This provision, permitting an IHO or the BSEA to review mediation agreements, was stripped from the mediation section of Article 7, and the current version does not permit such review. Therefore, the IHO properly denied the Student's request to do so.

The IHO did not err in refusing to address or resolve the attorneys' fees issue or to enter an order regarding the parties' mediation agreement. Both Article 7 and IDEA preclude the issues of prevailing party and entitlement to attorneys' fees from being addressed in a due process hearing. The IHO had no jurisdiction to consider the request for attorneys' fees and properly found that he was barred from doing so by both Article 7 and IDEA.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

On February 2, 2004, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. The IHO acted within his discretion and authority in dismissing all claims with the exception of the residential placement issue due to the Student's failure to comply with the IHO's discovery order.

3. Upon the successful mediation of the remaining issue concerning residential placement, there were no remaining unresolved issues requiring a hearing before the IHO. The IHO did not err in dismissing the due process hearing.
4. The Student's concerns arising after the residential placement occurred were not issues properly before the IHO. There were no unresolved issues before the IHO. Dismissal was appropriate.
5. Neither the IHO nor the BSEA has the authority or jurisdiction to determine prevailing party status nor to award attorney fees. "Determination of which party prevails and the amount of reimbursement shall be determined by negotiation between the parent and the public agency. If agreement cannot be reached, either party may proceed to civil court for resolution under section 6 of this rule. Mediation, as described in section 1 of this rule, is not available for resolution of legal fees." 511 IAC 7-30-4(p). An action for attorneys' fees must be filed in a civil court with jurisdiction within 30 days after the receipt of the IHO's final decision or, if appealed, within 30 days after receipt of the decision of the BSEA. 511 IAC 7-30-6.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals rules as follows:

1. The IHO's decision is affirmed in its entirety.
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: February 2, 2004

Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has the right to seek judicial review in a civil court with jurisdiction within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4- 21.5-5-5 and 511 IAC 7-30-4(n).